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Supreme Court of the United States

OCTOBER TERM, 1940.

No. ~~822~~ 36

J. E. PIERCE, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND SUPPORTING BRIEF.

L. E. GWINN,
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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

J. E. Pierce, petitioner herein, and E. H. Roach were convicted for alleged violations of Section 32 of the Criminal Code (18 U. S. C. A. Sec. 76), prohibiting the impersonation of officers or employees of the United States. The judgment of conviction was reversed (86 F. 2d 949).

On a second trial, Roach was acquitted and the jury disagreed as to petitioner.

The third trial resulted in the conviction of petitioner on fifteen counts of the indictment. Cumulative prison sentences, aggregating eight years, and fines, totaling $2,500, were imposed (R. 13, 14).

The Circuit Court of Appeals affirmed the judgment of conviction. Its opinion appears at pages 347-350 of the record and in the advance sheets of the Federal Reporter for December 30, 1940 (115 F. 2d 399).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

Petitioner was editor of the Huntsville (Alabama) Daily Register. His prosecution arose out of an advertising campaign, conducted by him in behalf of that paper, this campaign beginning prior to the passage of the Tennessee Valley Authority Act of 1933 (R. 137, 140).

The indictment charged that petitioner pretended to be a representative of the Government, selling "T. V. A. Units" and the Government sought to prove that he represented himself to be an officer of the Government or a representative of the T. V. A. engaged in the sale of T. V. A. Units.

It was the insistence of petitioner and Roach who accompanied him throughout his canvass that they never heard the expression "T. V. A. Units" until the arrest of petitioner in this case and like testimony was given by witnesses who heard in the aggregate several hundred of the sales talks made by petitioner in the solicitation of funds for publicity advertising in his newspaper (R. 215, 217, 223, 235, 250, 257).

Funds were solicited for page advertisements of counties, and the advertising campaign had been under way for more than two years (R. 139) when petitioner was arrested in Gibson County, Tennessee, on a state charge. This arrest was made at the instance of a small group of citizens whose demand for a refund of money paid peti-

tioner had been refused (R. 169). It resulted in the federal prosecution.

In the canvass of 17 counties in North Alabama, 46 counties in Mississippi, and 11 counties in Tennessee, that preceded the arrest of petitioner in Gibson County, Tennessee, several thousand subscriptions had been obtained and thousands of copies of the paper, containing the page advertisements, had been mailed to sponsors in the territory canvassed, including the mailing of hundreds of copies to citizens of counties contiguous to Gibson (R. 139-154).

Funds were solicited and obtained not only from individuals, including bankers, lawyers, doctors, merchants, but also from colleges, governing authorities of municipalities, including a town in a county adjoining Gibson, and from Chambers of Commerce (R. 196).

Every check, and payments were usually made by check, whether written by petitioner or by the subscriber, was made payable to the Huntsville Daily Register or bearer and showed in its face that it was given for "advertising" (R. 37, 208, 165, 73).

In every instance where petitioner obtained funds, whether in cash or by check, a receipt on the printed bill head of the Huntsville Daily Register was then and there given the person making the payment. This receipt, showing the purpose for which the funds were paid and received, was written in the presence of the contributor and was signed by petitioner as editor of the paper (R. 46, 51, 53, 54, 60, 66, 69, 70, 75, 85, 100, 104, 109, 130, 132).

To illustrate the plan, and show the character of work done in other counties, copies of the Huntsville Daily Register, containing page advertisements of counties, bound together in a bundle called the "dummy," were exhibited to every prospect, and in connection with this demonstration the advantages of community organization, cooperation and publicity in securing "lower taxes, better roads and cheaper power" were emphasized by petitioner (R. 40, 49, 63, 67, 77, 88, 98, 105, 124).

To comprehend this plan required the prospect to listen and to observe, and it is the contention of petitioner that the failure of some of the Government witnesses either to observe or to listen with due care explains the impression or conclusion, apparently formed in a few instances, that petitioner was acting in an official capacity—a conclusion in direct conflict with that formed by the overwhelming majority of the persons who heard the plan presented in a sales talk of such uniformity that it was designated as a "canned sales talk" by persons who heard it more than once (R. 259, 260).

As to the expression "T. V. A. Units," Roach thus testified:

> "The first time I ever heard the expression 'T. V. A. Units' was after we were arrested in Gibson County. Such an expression was never used by Mr. Pierce in my presence in the presentation of his plan. He did speak of 'units of advertising'—was divided into 240 units—the plan called for the public underwriting $1,400 and the newspaper underwriting $1,000" (R. 263).

To the same effect was the testimony of disinterested witnesses who in the aggregate heard hundreds of presentations of the plan (R. 206, 207, 218, 222, 230, 237, 251).

Petitioner will now state more specifically the matters involved in the petition.

(a)

The Indictment.

In each count of the indictment, it was charged that Petitioner, J. E. Pierce, and E. H. Roach, with intent to defraud, did "falsely assume and pretend to be officers of the United States, to-wit, representatives of the Government selling T. V. A. units" (R. 1-11).

(b)

Statute Involved.

The indictment charged violation of Section 32 of the Criminal Code (U. S. C. A., Title 18, Section 76). This statute was amended on February 28, 1938, the amendment being made after the reversal of this case and subsequent to all transactions involved in the indictment. The statute, with the amendment of February 28, 1938, shown in bold type, is as follows:

> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, **or under the authority of any corporation owned or controlled by the United States**, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department thereof, or any officer of the Government thereof, **or any corporation owned or controlled by the United States**, any money, paper document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

(c)

Theories of Parties.

On the first trial, it was the theory of the prosecution that the Tennessee Valley Authority was an "arm of the Government" or a "branch of the Government," and that an impersonation of officers or employees of that corporation constituted a violation of Section 32 of the Criminal Code (Petition for rehearing, p 2; R. 352).

At that trial, while denying that such officers or employees were impersonated, it was the contention of petitioner that the officers and agents of the Tennessee Valley

Authority were not included within the scope of the statute under consideration as it then existed.

This contention was sustained by the Court of Appeals but held to be inapplicable to the issues presented by the first appeal.

(d)

Holdings of Court of Appeals.

At the first trial, the court was not asked to instruct the jury as to the distinction, if any, between an impersonation of officers or employees of the Tennessee Valley Authority and those of the Government, but motion was made to quash the indictment and also to direct a verdict in favor of the defendants on the ground that the T. V. A. was a corporate entity distinct from the Government.

In his opinion, reversing the case, Judge Simon held that the indictment did not charge that petitioner and his co-defendant represented themselves to be "agents or employees of the Tennessee Valley Authority" but charged that they "assumed or pretended to be representatives of the Government" (86 F. 2d 951).

But notwithstanding the above holding, the Government at the subsequent trials developed its case on the theory that the T. V. A was an "arm of the Government" (R. 316), and, as will later be shown, Government witnesses made no distinction between the Government and the Tennessee Valley Authority.

In that situation, petitioner asked the trial court to instruct the jury directly and explicitly that the "Tennessee Valley Authority, commonly designated as the T. V. A., although an instrumentality of Government, is a corporate entity separate and distinct from the Government itself, and the officers and employees of that corporation are not within the scope of the statute on which the indictment in this case is based" (R. 308).

This request, set out in full in Question 2, *infra*, was refused.

Speaking of that refusal, Judge Arant, in his opinion affirming the case, said:

> "Appellant claims that the testimony of government witnesses could be construed to mean that appellant represented himself to be an officer or employee of the Tennessee Valley Authority and insists that the general charge will be examined in vain for the semblance of a suggestion that officers or employees of the Tennessee Valley Authority were not within the purview of the statute. So vital a matter, he contends, should have been called to the attention of the jury in an explicit instruction.
>
> We disagree. The charge was explicit, and the conviction was supported by evidence that the appellant held himself out not as an officer or employee of the Tennessee Valley Authority, but as 'acting under the authority of the United States Government,' which is quite a different thing and clearly within the condemnation of the statute" (Opinion, 115 F 2d 401; R. 347).

To sustain petitioner's contention, not controverted by the opinion, that there is not a tinge nor a color of either statement or suggestion in the general charge that the T. V. A. was a corporate entity, separate and distinct from the Government, reference is made to the charge (R. 294-308).

To show that the Government witnesses, regarding the Tennessee Valley Authority as identical with the Government, made no distinction in their testimony between that corporation and the Government, and also that most if not all of the Government proof, if accepted at its face value, showed a claimed connection with, or representation of, the T. V. A., and nothing more, we recite the Government testimony under each count of the indictment as to the claimed representations made by petitioner.

(e)

The Government Testimony.

With the exception of Count II, two counts, one under the first and the other under the second clause of Section 32 of the Criminal Code, were based on each of the several transactions in the indictment, a single witness testifying to the transaction in each count or pair of counts, as follows:

Count II. "He (Pierce) approached me and claimed he was selling TVA units * * * I wouldn't be positive about the Government" (R. 52, 55, 56) is the testimony of the Government witness Witt in regard to the transaction in Count II. It appears without dispute that this same witness at a preliminary hearing two days after the transaction testified that he did not remember petitioner saying anything about the Government (R. 288).

Counts IV and V: "We represent TVA, Muscle Shoals power and sell TVA units of $10 a unit * * * We put up dollar for dollar each dollar the people put up" is the language attributed to Pierce by the Government witness Utley (R. 59) who alone of all the witnesses claimed to be able to repeat the language used by petitioner.

Counts IX and X: "We are here representing the Government, trying to sell TVA units," is the language attributed to Pierce by the Government witness Clarence Lucky. This witness also testified that he did not look at the receipt, given him by petitioner, till he got home, that he paid little or no attention to the use of newspapers in demonstrating the plan, and that he was stating his "understanding without any ability to recall the exact language that was used" (R. 110-112).

Counts XI and XII: "He (Pierce) * * * told me that he was representing the Government selling TVA" are the words attributed to Pierce by the witness Simpson.

This witness further testified that petitioner did not claim to be an "officer of the United States Government" but said that he was "working in the interest of the Government promoting cheaper power" (R. 78). At the preliminary hearing, as appears without question in the record, this witness thus testified:

> "They (petitioner and Roach) said they was in here working in the interest of the TVA" (R. 78, 79).

Counts XIV and XV: "He (Pierce) told me a bit about TVA and wanted to sell me some units and I didn't feel able to buy them and he told me that they would match dollar for dollar—

> Q. Who would match dollar for dollar?
> A. The Government, and I bought two units in TVA"

is the testimony of Frank Blackman, regarding the transaction in Counts XIV and XV (R. 66). This witness, at the preliminary hearing, testified that Pierce said he was "working in the interest of Muscle Shoals project" (R. 70, 288). On cross examination at the trial herein he testified that Pierce did not say the "Government" would match contributions, that he actually said "We will match dollar for dollar," which the witness construed as a reference to the Government because petitioner said he was "selling TVA units and Muscle Shoals power" (R. 71).

Counts XVI and XVII: "He (Pierce) said I am representing TVA in their project to get to the rural communities in the TVA territory" is the language of the witness Conyers (R. 120). At the former trial, this witness testified thus: "* * * he (Pierce) told me it was all in *furtherance of this TVA program the Government was so interested in*" (R. 128).

Counts XVIII and XIX: "He (Pierce) said he was representing TVA and wanted to sell me units in the

TVA" is the language attributed to Pierce by the Government witness Robinson. Robinson further testified that when he asked Pierce if the $20 subscription the witness made would result in his getting cheaper lights, petitioner responded, "No, it is for advertising" (R. 88). Robinson at the first trial did not use the word "government" in detailing the statement made to him by Pierce, but in his testimony at the second trial added that word to the statement he attributed to petitioner. At the third trial, he thus explained the addition of the word "government," saying: "The reason I put in the Government was that he (Pierce) was selling TVA and I knew that was a Government project" (R. 316, 317).

Counts XX and XXI: "He (Pierce) told me the purpose he was there for—there in the interest of the Government, selling the people of Crockett County TVA units or stock" (R. 91), is the statement attributed to Pierce by the Government witness Cherry. At the second trial undertaking to detail this statement, the witness made no mention of the word "Government" but said: "He (Pierce) said he was there to sell some TVA units or stock to us farmers of Crockett County and other counties and insisted on me taking $100 worth of units—stock in TVA" (R. 330).

(f)

Questions Presented.

(1) Whether there is any substantial evidence that petitioner in any transaction, made the basis of a count in the indictment, falsely impersonated an "officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof," this question being duly raised by motion for a directed verdict, made at the conclusion of the evidence for the Government and renewed at the conclusion of all the evidence, exception being taken to the action of the Court in overruling this motion (Tr. 293).

(2) Whether the Court erred in refusing, over the objection and exception of petitioner, a special request duly tendered by the defendant and relating to a material matter not included in the Court's general charge, this request being as follows, to-wit:

> "At the request of the defendant, the Court further instructs the Jury that the Tennessee Valley Authority, commonly designated as T. V. A., although an instrumentality of the Federal Government, is a corporate entity, separate and distinct from the Federal Government itself, and the officers and employees of that corporation are not within the scope of the statute on which the indictment in this case is based. Consequently, any claim or representation by the defendant, if you find that such claim or representation was made, that he was representing the T. V. A., or was connected with the T. V. A. as an officer or employee, would not constitute the false impersonation of an officer or employee of the United States Government or any department thereof, within the meaning of the Statute which the defendant is alleged to have violated in the several counts of the indictment" (R. 308).

(3) Whether a mere verbal declaration of a connection with, or representation of, the Federal Government that is not accompanied by any act in keeping with the pretense constitutes an offense under Section 32 of the Criminal Code. Or, otherwise stated, where no badge or insignia of office is displayed, does not the completion of the offense require the performance or attempted performance of an actual or colorable official act?

(4) Whether an indictment which charges in general terms that the accused did falsely pretend to be "officers of the United States, to-wit, representatives of the Government selling T. V. A. units * * * and take upon themselves to act as such" is sufficiently descriptive of any actual or apparent official act to charge the offense denounced by either clause of Section 32 of the Criminal Code. (This question is included in order that it might be

relied on at the hearing if the writ should be granted and further reference thereto will not be made in the petition or the brief.)

II.

REASONS WHY THE WRIT SHOULD BE GRANTED.

(1) The evidence upon which the Circuit Court of Appeals affirmed the judgment is so uncertain, indefinite, conjectural, weak and inconclusive that it can not under the federal rule raise a question of fact upon the material issue in the case, to-wit, the alleged false impersonation of officers of the United States Government, and therefore the District Court should have directed a verdict in favor of petitioner, and after that Court failed to do so, the Court of Appeals should have reversed the judgment.

In failing to do so the Circuit Court of Appeals disregarded the well settled principle that testimony regarding oral statements, and especially where the exact language of the declarant is a material consideration, is inherently weak and dangerous (*Throckmorton* v. *Holt*, 180 U. S. 551; *American Bell Telephone et al.* v. *People Telephone Co. et al.*, 22 Fed. 309), and the equally well settled principle that in determining the impression sought to be conveyed by a transaction involving words and acts the principle of "completeness" should be applied both to "recollection" and "observation" (Wigmore, 3rd Ed., Secs. 729, 2099) and the intent of the party making the statement or giving a demonstration determined by the "whole impression or effect of what has been said or done" (Wigmore, 3rd Ed., Secs. 1040, 2099).

No Government witness, testifying to a transaction involved in the indictment, whose testimony even by a strained construction thereof could be interpreted as evidence that petitioner represented himself to be an of-

ficer or agent of the federal government, claimed to be able to state the exact language used by petitioner or to have observed with care the things done by petitioner in presenting his plan. In holding that such testimony, which did not represent the tenor of petitioner's utterance as a whole but mere fragments of it, was sufficient to overcome positive opposing testimony and otherwise unimpeached documentary evidence, the Court of Appeals disregarded the federal rule with respect to the quantum of evidence necessary to support a verdict as pronounced by this Court in *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720.

(1a) The Government testimony, relating to transactions in the indictment, consists largely of impressions and conclusions, which, when considered in connection with all the facts and circumstances, are as consistent with a misunderstanding on the part of the witnesses as with a misrepresentation by petitioner, and therefore the Court of Appeals in affirming the conviction disregarded the settled federal rule that peremptory instructions should be given where the evidence, viewed as a whole, is as consistent with innocence as with guilt. *Union Pacific Coal Co.* v. *U. S.*, 173 Fed. 737 (8 C. C. A.), *Nicola* v. *U. S.*, 72 F. 2d 780 (3 C. C. A.).

(2) In view of the mass of evidence relating to the Tennessee Valley Authority, so vital a point as the distinction between that corporation and a department of the government should have been covered by a clear and explicit instruction. *Bird* v. *United States*, 100 U. S. 356, 45 L. Ed. 570; *Little* v. *U. S.*, 73 F. 2d 861 (C. C. A. 10); *U. S.* v. *Messinger*, 68 F. 2d 234 (C. C. A. 4).

Bird v. *United States* holds that the defendant "has a right to a full statement of the law from the Court" and that the charge should "bring into view the relations of the particular evidence adduced to the particular issue involved."

Little v. *U. S.* and *U. S.* v. *Messinger*, *supra*, hold in substance that the defendant's side of the case, or the converse of the government's theory, should, upon request, be submitted to the jury.

The Court of Appeals in approving the refusal of the District Court explicitly to instruct the jury that the Tennessee Valley Authority was a corporate entity, separate and distinct from the Government, rendered a decision in conflict with the above cases and a decision that so far departs from the usual and accepted course of judicial proceedings as to call for an exercise of the supervisory powers of this court.

(3) Not withstanding the decision of the Court of Appeals on the first appeal that the Tennessee Valley Authority was a corporate entity, separate and distinct from the Government, and that the indictment did not allege the impersonation of officers and agents of that corporation, the general charge of the trial court in the instant case will be searched in vain for even a hint or an intimation that officers and employees of the Tennessee Valley Authority were excluded from the class of officers and employees whose impersonation was prohibited by Section 32 of the Criminal Code.

In that situation the refusal of the special request, a correct statement of the law that was applicable to the evidence introduced by the Government, was reversible error, and in sanctioning that refusal the Court of Appeals disregarded the rule pronounced by this Court in *Thorwegan* v. *King*, 111 U. S. 549.

(4) The indictment herein, as construed by the Court of Appeals in its opinion reversing the first conviction (86 F. 2d 949), did not charge petitioner with an impersonation of officers or agents of the Tennessee Valley Authority. The Government evidence, however, or the most of it, if it showed the impersonation of any officials only established an impersonation of officers or agents of the Tennessee Valley Authority. This

being true, the refusal of the special request under consideration impliedly authorized the jury to convict on a charge not made in the indictment, and conviction on a charge not made is a sheer denial of due process of law. *Thornhill* v. *Alabama*, 310 U. S. 88, 98. In sanctioning a conviction which within the range of reasonable possibility may have been made on a charge not embraced in the indictment, the Court of Appeals so far departed from the usual and accepted course of judicial proceedings as to justify an exercise of the supervisory powers of this Court.

(5) In holding on the first appeal (86 F. 2d 949), and thus establishing it as the law of the case, that a mere verbal declaration of a general or undefined federal agency or employment constitutes the false impersonation that is an essential element of both offenses denounced by Section 32 of the Criminal Code, the Court of Appeals decided a federal question of importance not theretofore adjudicated by this Court and in a way that is probably untenable and in conflict with the decisions of this Court in *Barnow* v. *U. S.*, 239 U. S. 74, and *Lamar* v. *U. S.*, 241 U. S. 103. These cases hold that the overt act necessary to the completion of either offense denounced by the statute (Cr. Code 32) need not be a legally authorized act but must be an act *in keeping with the pretense and done in the pretended character of a federal officer.*

No act in keeping with a pretense of federal authority, if such a claim was made, is shown to have been committed by petitioner in any transaction involved in the indictment. On the contrary, petitioner only collected funds as a representative of a newspaper and the receipt given when money was paid to and received by him expressly so shows.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Sixth

Judicial Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket: Number 8352, Criminal, J. E. Pierce v. United States of America, to the end that said case may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code (U. S. C. A., Title 18, Section 347), and that the judgment of the Court of Appeals for the Sixth Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

L. E. GWINN,

Counsel for Petitioner,
J. E. Pierce.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of Lower Courts

No opinion at the last trial was filed by the District Court. The opinion of the Court of Appeals (R.) is published in 115 F. 2d 399.

II.

Jurisdiction.

The jurisdiction of this court is invoked under the provisions of Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347), as amended, and by the Act of Congress of March 1, 1934, and Rule XI of the Rules of Practice and Procedure promulgated by this court May 7, 1934.

The judgment of the Court of Appeals was entered November 15, 1940.

Petition for rehearing, filed December 10, 1940, was denied February 4, 1941, and this petition for certiorari is filed within the thirty day period thereafter allowed by the rules of this Court.

The transcript of the record in the case, including the proceedings in the Court of Appeals, has been filed herein in accordance with Rule 38 of this Court.

III.

Specifications of Error.

The errors here complained of have been set out in substance under "Questions Presented," in the petition, and will, therefore, not be specifically set out here.

IV.

The Facts.

The uncontroverted evidence shows:

(1) That petitioner, a newspaper man with more than forty years experience (R. 135), was editor of the Huntsville (Alabama) Daily Register, a paper with a small circulation, published in the Muscle Shoals territory, and Vice President of the corporation that published the paper (R. 135).

(2) That prior to the passage of the Tennessee Valley Authority Act of 1933, this paper began a campaign in which funds were solicited for page advertisements of counties or groups of counties (R. 137, 140), and petitioner, having been long identified with civic enterprises, including road improvements and power development in rural communities, was designated to conduct that campaign (R. 137, 138). As early as 1921, petitioner's activity in behalf of better roads and the "development of North Alabama through the use of Muscle Shoals power" had won high praise from newspapers in that territory (R. 137). At the time of the trial herein he was Vice President and a member of the Advisory Council of the United States Good Roads Association (R. 138).

(3) The campaign had been under way and with marked success, for more than two years when the transactions involved in the indictment were had in Gibson and Crockett Counties, Tennessee. This prior canvass had covered 17 counties in North Alabama, 46 counties in Mississippi, and 11 counties in western Tennessee (R. 139, 140, 141).

(4) The plan involved the raising of $1,400 to pay the cost of the page advertisement of the county or group of counties to which it was devoted. The advertisement set forth the natural and potential resources of the county,

contained the names of the sponsors, and in small spaces used for that purpose advertised any property they had for sale. This page advertisement was published in twenty different but not consecutive issues of the paper. In so far as it was an advertisement of the county, it was rewritten for each publication, but no change was made in that part of the advertisement devoted to the sponsors (R. 143). These advertisements were prepared and published in accordance with the agreements of petitioner (R. 145, 149).

(5) At regular rates, the series of page advertisements of a county or group of counties would have cost $2,400. As a basis on which to solicit funds, this cost was divided into 240 units of $10 each, and it was stated to the prospective contributors that petitioner or his paper would take care of $1,000 of the $2,400, and publish the advertisement if the county would raise $1,400 (R. 144), this being solicited on the basis of $10 a unit. No subscription for less than ten dollars was accepted (R. 151).

(6) The only credential or evidence of authority presented by the petitioner in his talks to Government witnesses, or anyone else, was a letter of identification and information, *written on the stationery of the Huntsville Daily Register, stating the objects and purposes of the work being done by the petitioner's office*, and read to the persons from whom funds were sought or obtained (R. 139, 227, 236, 261, 262). This letter, omitting the heading, is as follows:

"Huntsville, Alabama
April 21, 1934

"To Whom It May Concern:

"This will introduce J. E. Pierce, Editor and Vice-President of the Huntsville Daily Register, Huntsville, Alabama.

"As a matter of information and identification, Mr. Pierce is 53-years of age, 6 ft. tall, weighs 196-lbs. on the average, prematurely gray, wears glasses, car-

ries cane, and while presenting pleasing personality and stately appearance, he is modest and of a retiring disposition.

"Mr. Pierce erected one 12-story office building in Huntsville, he is one of the Directors of the magnificent 12-story hotel here, one of the owners of a 7-story bank building, a substantial farmer, is a Deacon in the First Baptist Church and is actively identified in Chamber of Commerce and civic work generally.

"We have assigned Mr. Pierce to the task of completing the Muscle Shoals series of page newspape. advertisements (20-in number) for each group of one or more counties from the Georgia line to the Mississippi River.

"In this work, Mr. Pierce is authorized to transact any and all business pertaining to the interest of this company, including the endorsement of checks, drafts and other items made payable to order or otherwise in favor of this company. Banks, bankers and or trust company or companies, as well as individuals, are requested to so recognize his authority as Vice-President and or Editor of the Huntsville Daily Register.

"Any courtesies you may extend Mr. Pierce in the fine public work in which he is engaged will be appreciated on the part of the company, and thanking you, we are

Respectfully yours,

The Huntsville Daily Register,
The Register Publishing Company,
By 'Wm. H. Pierce' (Signed)
President"

(R. 35, 36.)

(7) In all transactions involved in the indictment and in every instance ir which money was paid to Pierce, he then and there, as a part of the transaction, gave to the party making the payment a receipt showing the purpose for which it was paid and the capacity in which it was received. This receipt was on the printed bill head or statement of the Huntsville Daily Register. It was written in the presence of the subscriber or the con-

tributor and signed by Pierce as Editor of the paper (R. 37, 46, 48, 49, 51, 53, 54, 60, 66, 69, 70, 74, 75, 85, 93, 100, 104, 109, 122, 130, 132).

Some of the witnesses testified that this receipt, written in their presence, was folded by petitioner when he handed it to the witness; others testified that it was open (R.). As to the folding thereof we quote from the testimony of one of the Government witnesses as follows:

> "Q. I wasn't asking you what you bought; I was asking you if you had any difficulty in understanding, when you examined the receipt, what you had paid your money for?
> A. No, sir; not after I read the receipt, I didn't.
> Q. And that receipt was given you at the time you gave him the check?
> A. Yes, sir.
> Q. All there as a part of the same transaction?
> A. That is right.
> Q. And even though it was folded, unfolding it just took an instant of time; didn't it?
> A. That is right; yes, sir" (R. 104).

(8) In a majority of cases payment was made by check and in every instance this check, whether written by the subscriber or by petitioner, was made payable to the "Huntsville Daily Register or Bearer" and showed on its face that it was given for "*advertising*" (R. 28, 66, 73, 74, 92, 103, 109, 128, 129).

(9) To illustrate the plan and show the prospect the character of work done in other counties, copies of the Huntsville Daily Register, carrying page advertisements of counties previously canvassed, were exhibited by petitioner to every Government witness testifying to a transaction involved in the indictment and to all the other witnesses, and all the witnesses admitted that such a demonstration was made in their presence by petitioner and the witness Roach as a part of the transaction in which funds were solicited (R. 25, 27, 34, 47, 51, 57, 65, 68, 75, 86, 97, 105, 110, 124, 126, 132).

(10) The verdict under each count rests on the recollection of a single witness who heard the presentation of the plan but once, and the record discloses no instance where any person who heard more than one presentation thereof formed an impression or conclusion that petitioner was acting in a federal official capacity. On the contrary, the record affirmatively shows that all persons who heard more than one presentation of the plan clearly understood that petitioner was soliciting funds for community advertising, and also that the response to its general presentation without the slightest claim or pretense of federal authority was such that from fifty to eighty per cent of the persons solicited made subscriptions (R. 206, 216, 218, 222, 227, 252).

(11) No Government witness, testifying to a transaction involved in the indictment, who formed the impression or conclusion that petitioner was connected with the Government claimed that he was able to repeat the exact language that was spoken with respect to the Government (R. 51, 69, 70, 77, 78, 86, 97, 110, 112, 123). As to other matters, such as the reading of the letter of identification, observation of what was written on checks they signed or on receipts given to them, and the exhibitions of the newspapers in demonstrating the plan, the testimony of these witnesses is a chorus of "I did not notice," "I paid no particular attention," and like statements (R. 40, 47, 57, 78, 105, 110, 111, 112, 126, 128). None of them claimed to have made any specific inquiry of petitioner as to the character of his office or employment nor to have asked or been told by petitioner what a "T. V. A. unit" was. The record does disclose, however, that petitioner was occasionally asked if he represented the Government but also that when such a question was asked he promptly and positively stated that he was not connected with the Government in any capacity (R. 167, 210, 230, 242, 257).

(12) The distribution of the papers, containing the page advertisements prepared by petitioner, were not re-

stricted to the regular circulation of the papers that carried the advertisements but copies thereof were sent to members of Congress, Governors, Chambers of Commerce and Advertising Bureaus, etc., throughout the country. Among favorable comments made on the character of these advertisements was a letter from Senator Capper of Kansas (R. 156); a resolution by the Arkansas State Legislature (R. 160), and the statement by a national organization of advertising experts, located in Chicago, that one of the "booster pages" for Gibson county was the "outstanding" advertisement of its class in June, 1935, that was discovered by that group after an examination of more than a thousand newspapers during that month (R. 148). These advertisements, like the sales talks, stressed the importance of community organization, co-operation and publicity to secure tax reduction, road improvement and power development, and petitioner testified that he believed that his program would aid in the accomplishment of these objectives (R. 202, 264).

V.

The Refusal of Petitioner's Special Request Was a Denial of Due Process of Law.

It was the theory of the prosecution at the first trial that the impersonation of officers or employees of the Tennessee Valley Authority constituted a violation of Section 32 of the Criminal Code (R. 316).

It was the contention of the defendants that the Tennessee Valley Authority, created by the 1933 Act (___) was a corporate entity, separate and distinct from the Government, and that therefore the officers and employees of that corporation were excluded from the purview of the section of the Criminal Code under consideration.

The Court of Appeals, reversing the first conviction, sustained the contention of the defendants but held that the indictment did not charge an impersonation of officers

or employees of the Tennessee Valley Authority (86 F. 2d 949).

Upon that construction of the indictment, the conviction of petitioner for an impersonation of officers or employees of the Tennessee Valley Authority—an offense not charged in the indictment—would be a sheer denial of due process of law. *Thornhill* v. *Alabama*, 310 U. S. 88.

As most of the Government testimony related to the alleged statements of petitioner that he was representing the T. V. A., and as the charge nowhere drew any line nor stated any distinction between the impersonation of officers or employees of the T. V. A. and officers or employees of the Government, the refusal of the special request, making clear that distinction, licensed the jury to convict on a charge not made in the indictment as construed by the Court of Appeals.

But that is not all.

Section 32 of the Criminal Code at the time of the transactions involved in this case did not prohibit the impersonation of officers or employees of a corporation of the character of the T. V. A., and its terms could not be extended by construction to include kindred acts that may have been as reprehensible as those denounced by that statute. The principle stated is too well settled to require citation of authorities.

In 1938, about three years after the commission of the offenses alleged in the indictment herein, the statute was amended so as to bring within its operation the impersonation of officers or employees of a corporation owned or controlled by the Government. But *ex post facto* legislation should not be given a retroactive effect by *de facto* judicial evasion.

The refusal of the special request under consideration is such an evasion with such a result.

No line being drawn by the general charge between the impersonation of officers of the Government and those of the T. V. A., the jurors, if they believed that petitioner

claimed to represent the T. V. A., would have returned a verdict of guilty under any count where such a representation was made although there was no evidence that petitioner also claimed to represent the Government. This is not a matter of speculation, as that is precisely what was done by the jury, which returned a verdict of guilty under all counts of the indictment, including those where the witness did not claim that defendant made any reference whatever to the Federal Government.

In view of the mass of evidence relating to the Tennessee Valley Authority, so vital a point as the distinction between that corporation and a department of the government should have been covered by a clear and explicit instruction.

Bird v. *United States*, 100 U. S. 356, 45 L. Ed. 570.
Little v. *U. S.*, 73 F. 2d 861 (C. C. A. 10).
U. S. v. *Messinger*, 68 F. 2d 234 (C. C. A. 4).
Bates County v. *Wills*, 239 Fed. 785 (C. C. A. 8).
Northern Central Coal Co. v. *Hughes*, 224 Fed. 57 (C. C. A. 8).

If we construe its opinion correctly, the Court of Appeals did not hold that the general charge drew any line between impersonation of officers or employees of the Government and those of the Tennessee Valley Authority, nor hold that the special request did not correctly state the law on the point therein stated but held in effect that its refusal was harmless error.

Such a conclusion was a jury-invading speculation.

How could that court determine what verdict would have been rendered under proper instructions without invading the province of the jury which is the "fact finding body in criminal cases" (*Patton* v. *U. S.*, 281 U. S. 276)?

Upon what theory consistent with the principle stated could the Court of Appeals hold that the verdict would not have been affected by an explicit instruction as to the effect and the limitations of the evidence relating to statements claimed to have been made by petitioner that he represented or was connected with the T. V. A.?

And upon what theory other than the failure of the jury to make any distinction between an impersonation of officers or employees of the Tennessee Valley Authority and those of the Government can the verdict on the transaction with Conyers (Counts XVI and XVII) be explained when there is not a whisper of evidence that petitioner in such transaction claimed any representation of or connection with any official agency except the T. V. A. (R. 120)?

Here is what Conyers testified:

> "He (Pierce) said, I am representing TVA in their project to get to the rural communities in the TVA territory. He said that the TVA has a proposition in which they propose to meet the counties in a subscription of something that he called units. He said each county, according to its area and population is asked to do so much, and the TVA, we are meeting that with TVA funds" (R. 120).

Other evidence might be quoted to show that the jurors, accepting the theory of the prosecution, could infer, and did infer, that the T. V. A. was part of the Government and that no distinction need be made between an impersonation of Government officials and the impersonation of T. V. A. employees in determining the guilt or innocence of the defendant (R. 316) but the foregoing is believed to be sufficient. This distinction was the determinative factor in nine counts and a material consideration in the others. This being true, the refusal of the special request was error as to all counts. *Lamento* v. *United States*, 4 F. 2d 900 (C. C. A. 8).

VI.

The Motion for a Directed Verdict Should Have Been Sustained.

In the opinion, the Court of Appeals states that a "witness who with positiveness could recount all the de-

tails surrounding an event that had occurred four years previously would be either a genius or unworthy of belief. 3 Wigmore on Evidence (3rd Ed., 1940), No. 726" (pp. 2-3).

The principle thus stated is sound. But the ability of a single witness to recall the exact language used by appellant, and the connection in which it was used, is the basis of the verdict under each count of the indictment.

An application of the principle stated, together with another principle, recognized by the same distinguished author, would seem to preclude any holding that there was substantial evidence to support the conviction under any count. We refer to the principle of "Completeness" as applied both to "Recollection" and "Observation" (Wigmore, 3rd Ed., No. 729, No. 2099), of a transaction involving both words and acts.

In attempting to narrate the words and acts of appellant, no witness other than Utley, who had obviously memorized his testimony at the former trial (R. 59, 62), claimed to be able to state the substance of the things said and done by appellant, considered as a whole, in presenting his plan. Utley's testimony does not establish any violation of the statute.

The impression which appellant intended to convey to any witness should be determined "not by individual words or phrases alone, but by the whole impression or effect of what has been said or done" (Wigmore, 3rd Ed., No. 1040).

"'Substance' though not reproducing the precise words, should at least represent the tenor of the utterance as a whole, and not mere fragments of it" (Wigmore, No. 2099).

Bearing in mind that an understanding of the plan presented by appellant required the prospect to exercise both his faculties of hearing and observation, that almost without exception government witnesses, testifying to transactions involved in the indictment, testified that they paid little or no attention to the newspaper demonstration,

made by appellant to every prospect as a part of the presentation of the plan, or to the exhibition or reading of letters to them, it seems quite clear that such testimony, neither as to details nor substance, meets the test of "completeness" that should be applied in determining its probative force.

The evidence conclusively shows that there was no material difference in the presentations of the plan to persons from whom appellant solicited funds, that the overwhelming majority of persons to whom it was presented clearly understood that appellant was acting in the capacity of a newspaper publisher, and that the comparatively few who understood otherwise reached that conclusion as the result of careless listening and deficiency of observation for which appellant was not responsible.

If tested by the foregoing principles, which we regard as sound and fair, the testimony of the government does not present a substantial conflict with the positive testimony of appellant and his witnesses. The case should therefore be controlled by the rule pronounced by the Supreme Court in *Gunning* v. *Cooley*, 281 U. S. 90, which rejects the scintilla rule and holds that where the evidence on one side is so overwhelming as to leave no room to doubt what the fact is, the case should not be submitted to the jury.

Further discussing the evidence, we state certain propositions, supported by the record which we think conclusively show that peremptory instructions should have been given to the jury.

(A)

It is indisputably established by the record that Pierce in the general course of the extensive campaign conducted by him was able to sell and did sell his plan to an overwhelming majority of the several thousand persons from whom he solicited subscriptions without the slightest pretense of Federal authority and that any

confusion of his publicity advertising with an officially sponsored T. V. A. or Government program only occurred in exceptional cases and then without the knowledge or design of Pierce.

The testimony of various persons who accompanied petitioner and Roach in the campaign for the solicitation of funds, and who stand unimpeached in the record, clearly sustains the above proposition. These witnesses are: Walter Brock (R. 206) and Dewey Claunch (R. 257), who accompanied defendant in the canvass of Mississippi counties immediately preceding the campaign in West Tennessee; R. E. Ross (R. 215), Ernest N. Drake (R. 217), Artie B. Dancer (R. 222), Ernest Caldwell (R. 235), J. H. Caughlin (R. 235) and E. C. Harrell (R. 250), who accompanied petitioner and Roach in the canvass of West Tennessee counties.

These ten witnesses accompanied petitioner for various intervals of time, ranging from three days to three months, and in the aggregate heard not less than a thousand (probably more) of the sales talks as made to all classes of persons and under conditions identical with those existing in Gibson and Crockett Counties, but not one of them ever heard the expression "TVA units" until the arrest of defendant in the present case; and each testified that petitioner was engaged in a campaign in which funds were solicited for newspaper advertising and that the plan was presented without any claim or pretense of Federal authority or official connection with the Tennessee Valley Authority.

There are two uncontroverted facts in connection with the general course of the business as conducted by Pierce which are destructive of the Government's theory of a general scheme to defraud the public through a false pretense of Federal authority. One of these is equally destructive of any theory that such was done in exceptional cases.

First: Petitioner as a rule was accompanied in his canvass of a county by some local resident of good char-

acter and standing, who was familiar with the roads of the county, and usually selected on recommendation of the Sheriff, or the Chamber of Commerce if such existed in the county. This party did not participate in the campaign further than to show the roads of the county and aid in locating the residences of persons on whom Pierce planned to call. But he either heard or had the opportunity to hear what was said in presenting the plan, and too often to be mistaken as to the nature of the plan. If Pierce was engaged in the execution of a plan to swindle the public it is inherently improbable that he would have followed the course pursued with respect to the employment of residents of the counties canvassed who would be available as witnesses to prove the representations that were made.

Second: Pierce, in every instance where money was received by him, gave the contributor a receipt written in his presence, showing the exact purpose for which the money was paid. If petitioner had obtained funds as a Federal Officer, a reading of the receipt meant immediate discovery and probably exposure of the fraud, and while Pierce was still engaged in a canvass of the county. Is this the course of a clever swindler, executing a scheme to defraud? Would any man with intelligence above that of a plain idiot perpetrate a dangerous fraud and as a part of the fraudulent transaction serve a written notice thereof on the victim of the fraud?

But that is what Pierce did if he obtained money in the pretended character of a Federal official for a T. V. A. program and at the same time executed a receipt showing that the money was paid to a newspaper for subscription and advertising. It is said however, that the receipts were folded. What of it? Did that afford any substantial protection? How long did it take to unfold one of these receipts?

The answers to these questions may be found in the testimony of the Government witness, M. R. Lewis; speak-

ing with reference to the receipt given him by the defendant this witness testified:

Q. And you had no difficulty in understanding it was for a newspaper?

* * * * * * *

Q. And that receipt was given you at the time you gave him the check?

A. Yes, sir.

Q. All there as a part of the same transaction?

A. That is right.

Q. And even though it was folded, unfolding it just took an instant of time; didn't it?

A. That is right; yes, sir (R. 104).

(B)

The testimony of the Government consists of hasty, impressions and unwarranted conclusions that bear no reasonable relation to the things said and done by defendant in presenting his plan and therefore do not present a substantial conflict with the direct and positive evidence that supports the theory of the defendant.

The proposition stated is clearly shown by an examination of the testimony of the Government witness Anderson, first witness for the Government. Anderson did not testify to any transaction involved in the indictment, but to a similar transaction. He testified that he understood that petitioner was a representative of the Government although he could not state the exact language used to convey that impression (R. 30, 32, 33).

On the first trial, this witness had testified with emphasis that he did not see nor sign the check for $100 given to petitioner at the conclusion of his sales talk to Anderson, but that this check was written and signed by the bookkeeper in the store of the witness. It developed, however, that Anderson personally signed the check, and he acknowledged his signature when it was produced, but that is not the point here stressed.

The check, written by Anderson's bookkeeper in a plain, bold hand, and signed by Anderson, was, upon instructions of petitioner to the bookkeeper in Anderson's presence, made payable to the newspaper and showed on its face that it was for "advertising." The bookkeeper, a Government witness, expressly so testified (R. 37). Furthermore, a receipt, executed by the paper through petitioner as its editor, was executed and delivered to the bookkeeper, contemporaneous with the signing of the check by Anderson (R. 37), these things being done in Anderson's private office. Obviously, any misunderstanding of the plan was the fault of the witness and neither designed by nor known to petitioner.

VII.

A Mere Verbal Declaration of a General or Undefined Federal Agency or Employment Unaccompanied by Any Apparent or Colorable Official Act Does Not Constitute the False Personation That Is an Essential Element of Both Offenses Denounced by Section 32 of the Federal Criminal Code.

In making the foregoing contention, we do not insist that the statute restricts either offense to the impersonation of a particular official or the performance of legally authorized acts. The statute may be violated although the assumed office or authority has no legal existence. But the statute requires something more than words to constitute a false impersonation. It does this in express terms: "Whoever, with intent to defraud * * *, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States * * *, and shall take upon himself to act as such, or shall in such pretended character demand or obtain any money, etc., * * * shall be fined or imprisoned" * * *.

False personation is the "gist" of both offenses punishable under this statute. *Little* v. *United States*, (9 C. C. A.) 169 Fed. 620; *Ferguson* v. *United States*, (10 C. C.

A.) 293 Fed. 361; *Read* v. *United States*, (2 C. C. A.) 252 Fed. 21. The prohibition of the first clause of the act is carried forward into the second by the use of the words "in such pretended character." *Lamar* v. *United States*, 241 U. S. 103.

In *King* v. *United States*, (5 C. C. A.) 279 Fed. 103, the Court thus construed an indictment which charged that the accused "did then and there in such pretended character place the said (naming the parties) under arrest":

> "The word 'pretend' in the connection in which it is used in the indictment, means the putting forward of a false appearance of being officers * * * the simulating or feigning to be officers."

In *Cronin* v. *People*, 80 Michigan 646, cited with approval by the Supreme Court in the Barnow case as to the construction of the clause, "And take upon himself to act," etc., the Michigan court, construing a state statute almost identical with the Federal statute, said:

> "The statute does not attempt to punish any person for falsely assuming to be any of the officers named in the section, but for assuming and taking upon himself to act or officiate in any office or place of authority."

How could any person "take upon himself to act or officiate in any office or place of authority," unless he exhibited some badge or insignia of office or performed a colorable official act? This need not be a legally authorized act, but it must be an act done in the "falsely assumed character" (*Lamar* v. *United States*, *supra*) and an act in "keeping with the pretense." *United States* v. *Barnow*, *supra*.

In the instant case, petitioner exhibited no badges, executed no purported official receipts, did not have in his possession any "T. V. A. Stock" or "T. V. A. Units," or anything purporting to be such, or bearing any Government label or signature. All he did was obviously the

act of a private citizen, not a Government official. Every check taken was payable to a privately owned and privately published newspaper, and its receipt was issued for all funds received by Pierce. If petitioner verbally claimed to be a Federal official, the acts done were destructive of that pretense.

The precise point here involved was not before the court in the Barnow case, but there is nothing in that decision in conflict with the construction of the statute for which we here contend. In that case, the accused was charged with selling a set of books, entitled "Messages and Papers of the Presidents," as a pretended agent of the United States, the purchaser believing that the Government would receive the money for the publication. It was held that this constituted a violation of the statute, although there was no person authorized to make such sales for the Government and the office, or place of authority, in which the accused assumed to act or officiate, had no legal existence. But "Messages and Papers of the Presidents" was a set of books that had been published under the authority of the Congress (*Bush* v. *United States*, 196 Fed. 579). Its possession and sale under a claim of Federal authority was an apparent official act.

In the instant case, however, it is alleged that the defendants claimed to be "representatives of the Government T. V. A. Units." There was no such thing as "T. V. A. Units," and claiming to sell something, if such a claim was made, that had neither legal nor actual existence, and was neither shown nor described to the purchaser, nor in the evidence, presents a radically different situation from the act of selling "Messages and Papers of the Presidents"—apparently a Government publication. One is a mere verbal declaration; the other a colorable official act.

Where there is no impersonation of a particular individual, known to be a Federal officer by the victim of the intended fraud, it is difficult to understand just how a non-existent Federal office or employment, or a general

Federal agency, could be impersonated or assumed without displaying a badge or insignia of authority or performing an apparent official act. It is the pretended official act that brings the case within the operation of the statute.

Conclusion.

Considered as a whole, the evidence herein is as consistent with a misunderstanding on the part of government witnesses as to the capacity in which petitioner acted as it is with a fraudulent misstatement by him of that capacity. This being true, the trial court, following the familiar rule that where all the substantial evidence is as consistent with innocence as with guilt, should have sustained the motion for a directed verdict. To hold otherwise is to do lip service to the substantial evidence rule but apply the scintilla rule rejected by this court in *Canning* v. *Cooley*, 281 U. S. 90.

Furthermore, it can not be determined on this record whether petitioner was convicted for a claimed representation of, or connection with, the T. V. A., not a federal offense at the time of the transactions involved in this case, or for an impersonation of officers or employees of the government. In that situation, the basis of the verdict being a matter of speculation, the conviction was a denial of due process of law. *Stromberg* v. *California*, 283 U. S. 359.

Licensing or sanctioning a speculative verdict, this being the necessary result of the refusal of the special request, presents a question of importance if due process is to remain a living force and not become an empty theory in the conduct of criminal prosecutions.

Respectfully submitted,

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